#### COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

OF THE

# JUDICIAL CONFERENCE OF THE UNITED STATES WASHINGTON, D.C. 20544

MEMORANDUM

Agenda E-19 (Appendix A)
Rules
September 2006

DAVID F. LEVI CHAIR

PETER G. McCABE SECRETARY CHAIRS OF ADVISORY COMMITTEES

CARL E. STEWART APPELLATE RULES

THOMAS S. ZILLY BANKRUPTCY RULES

LEE H. ROSENTHAL CIVIL RULES

SUSAN C. BUCKLEW CRIMINAL RULES

May 22, 2006 (Revised June 30, 2006)

JERRY E. SMITH EVIDENCE RULES

TO:

Judge David F. Levi, Chair

Standing Committee on Rules of Practice and Procedure

FROM:

**DATE:** 

Judge Carl E. Stewart, Chair

**Advisory Committee on Appellate Rules** 

RE:

Report of Advisory Committee on Appellate Rules

#### I. Introduction

The Advisory Committee on Appellate Rules met on April 28, 2006, in San Francisco, California. The Committee approved proposed new Rule 25(a)(5).

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#### II. Action Item

The Advisory Committee is seeking final approval of proposed new Rule 25(a)(5).

### A. Introduction

The Committee proposes to add a new Rule 25(a)(5) that addresses privacy concerns relating to court filings. New Rule 25(a)(5) will take a "dynamic conformity" approach, under which the privacy rules applicable below will also apply on appeal. In proceedings other than appeals from a district court, bankruptcy appellate panel, or bankruptcy court, privacy will be governed by new Civil Rule 5.2 (except that when an extraordinary writ is sought in a criminal case, new Criminal Rule 49.1 will govern).

## B. Text of Proposed New Rule and Committee Note

# Rule 25. Filing and Service

1	(a) Filing.	
2		* * * *
3	<u>(5)</u>	Privacy Protection. An appeal in a case
4		whose privacy protection was governed by
5		Federal Rule of Bankruptcy Procedure 9037,
6		Federal Rule of Civil Procedure 5.2, or
7		Federal Rule of Criminal Procedure 49.1 is
8		governed by the same rule on appeal. In all
9		other proceedings, privacy protection is
10		governed by Federal Rule of Civil Procedure
11		5.2, except that Federal Rule of Criminal
12		Procedure 49.1 governs when an extraordinary
13		writ is sought in a criminal case.
14		* * * *

#### **Committee Note**

Subdivision (a)(5). Section 205(c)(3)(A)(i) of the E-Government Act of 2002 (Public Law 107-347, as amended by Public Law 108-281) requires that the rules of practice and procedure be amended "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." In response to that directive, the Federal Rules of Bankruptcy, Civil, and Criminal Procedure have been amended, not merely to address the privacy and security concerns raised by documents that are filed electronically, but also to

address similar concerns raised by documents that are filed in paper form. *See* FED. R. BANKR. P. 9037; FED. R. CIV. P. 5.2; and FED. R. CRIM. P. 49.1.

Appellate Rule 25(a)(5) requires that, in cases that arise on appeal from a district court, bankruptcy appellate panel, or bankruptcy court, the privacy rule that applied to the case below will continue to apply to the case on appeal. With one exception, all other cases — such as cases involving the review or enforcement of an agency order, the review of a decision of the tax court, or the consideration of a petition for an extraordinary writ — will be governed by Civil Rule 5.2. The only exception is when an extraordinary writ is sought in a criminal case — that is, a case in which the related trial-court proceeding is governed by Criminal Rule 49.1. In such a case, Criminal Rule 49.1 will govern in the court of appeals as well.

## C. Changes Made After Publication and Comment

The rule is a modified version of the provision as published. The changes from the published proposal implement suggestions by the Style Subcommittee of the Standing Committee on Rules of Practice and Procedure.

# Rule 25. Filing and Service<sup>2</sup>

1	(a)	Filing.
2		* * * *
3		(5) Privacy Protection. An appeal in a case whose
4		privacy protection that was governed by Federal
5		Rule of Bankruptcy Procedure 9037, Federal Rule of
6		Civil Procedure 5.2, or Federal Rule of Criminal
7		Procedure 49.1 is governed by the same rule on

<sup>&</sup>lt;sup>2</sup> Changes from the proposal published for public comment shown by double-underlining new material and striking through omitted matter.

8	appeal. <u>In a</u> All other proceedings, <u>privacy</u>
9	protection is are governed by Federal Rule of Civil
10	Procedure 5.2, except that Federal Rule of Criminal
11	Procedure 49.1 governs when an extraordinary writ
12	is sought in a criminal case.

The Style Subcommittee suggested these changes out of concern that readers might not otherwise know the content of the trial-level rules referenced in Rule 25(a)(5). Judge Schiltz, then this Committee's Reporter, argued that the changes were unnecessary, because Rule 25(a)(5)'s caption reads "Privacy Protection." Judge Schiltz also argued that it was superfluous to specify that cases' "privacy protection was governed by" the relevant trial-level rules — rather than just stating that the *cases* were governed by those rules — because the relevant trial-level rules govern nothing but privacy protection. For the same reason, Judge Schiltz feared that the added language might confuse readers by suggesting (incorrectly) that the cited trial-level rules also govern matters other than privacy protection. The Committee, cognizant of the policy to defer to the Style Subcommittee on matters of style, voted to adopt the Style Subcommittee's changes but also to place Judge Schiltz's comments before the Style Subcommittee.

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